

MOUNTAIN VALLEY LUMBER, INC.,

AGBCA No. 2003-171-1

Appellant

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RULING ON MOTION BY DOJ AND CEQ TO INTERVENE

January 12, 2006

Opinion for the Board by Administrative Judge POLLACK.

On June 30, 2005, then-presiding Judge Anne Westbrook issued a Ruling on various discovery issues in the above captioned proceeding. Thereafter, the Board received several responses from both the Forest Service (FS) and Appellant, among which were motions from each seeking reconsideration of parts of the Ruling. In addition, the Board received two motions from the Department of Justice

(DOJ) and Council for Environmental Quality (CEQ) (filed by DOJ on behalf of both), each dated September 6, 2005. One asked the Board to grant those entities the status of interveners for purposes of discovery issues and the other sought reconsideration of Judge Westbrook's Ruling, particularly regarding whether discovery against DOJ and CEQ could be achieved through a subpoena to the FS, rather than through a separate subpoena to DOJ and CEQ. Judge Westbrook retired in August 2005. The appeal has been assigned to the undersigned, as the presiding judge.

In the Motion to Intervene, DOJ and CEQ move to intervene so as to challenge two aspects of Judge Westbrook's Ruling. In particular they seek to intervene so that they can seek reconsideration of what they characterized as the conclusion of Judge Westbrook in her Ruling, relating to the proper party for discovery. DOJ takes exception to Judge Westbrook's statement (relating to discovery) that the party appellee in this proceeding is the "United States of America" and not the Secretary of Agriculture. DOJ expresses the following concern, stating, "Based on the MVL Order, arguably both in this proceeding and in future appeals to the Board, a contractor could merely serve discovery requests on USDA counsel and obtain discovery from DOJ, CEQ or other non-USDA agency." DOJ then contends that such a result would be contrary to the Contract Disputes Act (CDA) and Agriculture Board of Contract Appeals (AGBCA) rules. In addition, DOJ asks for the right to intervene so as to protect DOJ's and CEQ's interests in not releasing documents for which those entities would claim privilege. Noteworthy, in DOJ's motion to intervene is DOJ's expressed concern that the MVL Order directed DOJ and CEQ to respond to discovery requests served on USDA counsel without any opportunity for DOJ or CEQ to challenge the discovery order and without those agencies being parties to the contract in issue.

The Board has considered the motion of the DOJ and CEQ to intervene and denies that request. The decision on allowing intervention is a matter within the discretion of the Board. This Board, in a Ruling in S. Powell Construction Co., AGBCA Nos. 2004-119-1 through 123-1 (Ruling dated August 26, 2004), previously addressed whether and where it will allow intervention. In S. Powell, the parties seeking the right to intervene were local sponsors of sewer projects which were attempting to protect their interests, since as co-sponsors, they faced financial responsibility if the Board held USDA responsible for costs. In S. Powell, the Board ruled that the interest of the local sponsors could be adequately protected by allowing local sponsors to participate in some limited roles, without the need for formal intervention.

The Board finds a similar approach to be appropriate here. Accordingly, while the Board denies intervener status to DOJ and CEQ, the Board will allow those entities to participate in proceedings as to the discovery issues and as to documents in their possession. Moreover, since the DOJ and CEQ's Motion on Reconsideration filed with the Board on September 6, 2005, deals with issues relating to discovery, the Board has considered the arguments made in that motion in arriving at the conclusions set forth in the Board's separate Ruling on this date on reconsideration of those issues. The separate Ruling on Reconsideration also includes directions as to how the FS, DOJ and CEQ are to proceed with the remaining discovery.

RULING

The Motion of DOJ and CEQ to intervene is denied.

HOWARD A. POLLACK

Administrative Judge

Issued at Washington, DC

January 12, 2006